Supreme Court, U.S.
FILED
95-377 SEP 8 1995
OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term, 1995

TERRY S. FITTEN,
MESS MANAGEMENT SPECIALIST THIRD CLASS
U.S. NAVY
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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84 pp

QUESTION PRESENTED

WHETHER A FORCED EXTRACTION OF URINE BY CATHETER IS AN UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT AND VIOLATES DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT.

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IN THE

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OCTOBER TERM, 1995

TERRY S. FITTEN,
MESS MANAGEMENT SPECIALIST THIRD CLASS,
UNITED STATES NAVY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Terry S. Fitten respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (App., *infra*, 1a-9a) is reported at 42 M.J. 179. The

opinion of the Navy-Marine Corps Court of Military Review (App., *infra*, 10a-57a) is reported at 39 M.J. 659.

JURISDICTION

The Court of Appeals for the Armed Forces entered its judgment on June 12, 1995 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in relevant part:

> The right of the people to be secure in their persons ... against unreasonable searches and seizures shall not be violated ...

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall be ... deprived of life, liberty, or property, without due process of law...

Relevant portions of Military Rules of Evidence 312 and 315 are set forth at App., *infra*, 58a-63a.

STATEMENT OF THE CASE

A. The Facts

On December 16, 1991, Petitioner, a petty officer in the U.S. Navy, was absent for 2 1/2 hours without authority from his unit, Naval Training Center (NTC), San Diego, California. Upon his return, he appeared intoxicated and disoriented. He was sent to the Branch Medical Clinic for a fitness for duty examination, where he was found unfit for duty by reason of drug or alcohol abuse. He was then taken to the Naval Hospital Emergency Room, where medical personnel observed that he was disoriented, combative, and would intermittently fail to respond to questioning or gentle stimuli. Petitioner was placed on a gurney in limited restraint to immobilize his neck and back; his hands were taped to the gurney. Diagnostic tests were ordered, including a urinalysis to test for dangerous drugs. Petitioner was asked to provide a urine sample by natural evacuation. However, he either could not or would not.[1]

A criminal investigator, Senior Chief Rodney Burton, was dispatched to the hospital by Lieutenant Commander (LCDR) Charles Clopton, the Staff Judge Advocate for NTC, San Diego. LCDR Clopton suspected Petitioner of drug abuse and wanted Senior Chief Burton to get a urine sample from Petitioner for use in disciplinary proceedings against Petitioner. Senior Chief Burton asked Petitioner to consent to provide a urine sample. Petitioner at first agreed, then lost consciousness, and then declined to provide Senior Chief Burton with a sample.

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[1] The evidence is unclear on this point.

A nurse then told Senior Chief Burton that Petitioner admitted to her that he had taken drugs over the weekend. Senior Chief Burton relayed this information by telephone to LCDR Clopton, and asked whether there was probable cause for a command search authorization to compel Petitioner to provide a urine sample. LCDR Clopton told Senior Chief Burton that he would check and call him back. LCDR Clopton called back five minutes later and told Senior Chief Burton that they had probable cause and command authorization to compel Petitioner to provide a urine sample.

Senior Chief Burton went to Petitioner's gurney, where the nurse was preparing to obtain a diagnostic urine sample by catheter. Senior Chief Burton told the nurse that he had command authorization to get an evidentiary urine sample from Petitioner, and asked the nurse if she could get it through the catheter for him. The nurse agreed.

Petitioner told the nurse that he did not want to be catheterized, and that he could produce urine naturally if given water. Petitioner resisted insertion of the catheter, and broke free of his restraints. Petitioner was then subdued by medical and security personnel and placed in four-point leather restraints. With Petitioner's hands and legs now immobilized, the nurse inserted a catheter through Petitioner's penis, into his bladder. The catheter was 18 inches long and 1/8 inch wide. Petitioner was conscious, with his genitals exposed to a crowd of approximately ten onlookers, some of whom were not medical personnel. To start the flow of urine, the nurse had to manipulate the catheter and pump air into Petitioner's bladder. When the urine began to flow, some

of the onlookers applauded. Petitioner was in pain, was crying, and felt degraded.

The nurse filled a bottle with Petitioner's urine. She then took Senior Chief Burton's bottle and attached it to the catheter. There was not enough urine in the second bottle for urinalysis testing, so the nurse poured some urine from the first bottle into the second. The first bottle was sent to a hospital laboratory to test for dangerous drugs. The results of this test are not in the record. The second bottle was given to Senior Chief Burton, who took it to the Navy Drug Lab, where it tested positive for cocaine and marijuana.

B. Proceedings Below

Petitioner was charged, *inter alia*, with wrongful use of cocaine and marijuana in violation of UCMJ, Article 112a, 10 U.S.C. § 912a. At his court-martial, he moved to suppress the results of the Navy Drug Lab urine test. The military judge denied the motion. Petitioner then entered conditional pleas of guilty to the two drug offenses. He was found guilty in accordance with his pleas and was sentenced to 45 days confinement, reduction to pay grade E-1, and a bad-conduct discharge.

The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. The lead opinion reasoned that the urinalysis results were admissible under two alternative theories. First, all of the urine obtained was essentially one sample, which was obtained for a valid medical purpose, and was thus admissible under Mil.R.Evid. 312(f). Second, the urine sample was obtained in a reasonable fashion, by qualified medical personnel, pursuant to command search authorization, and was thus

admissible under Mil.R.Evid. 312(d). Use of a catheter, in the Court's view, did not shock the conscience under *Rochin v. California*, 342 U.S. 165 (1952).

Senior Judge Mollison dissented. In his opinion, a search and seizure by catheterization is *per se* unreasonable under the Fourth Amendment, and thus cannot be sanctioned under Mil.R.Evid. 312(d). He also opined that Mil.R.Evid. 312(f), which permits admission of evidence obtained for a valid medical purpose, does not justify the admission of the test results in this case. In Senior Judge Mollison's view, once the valid medical purpose for an intrusion ends, the admission of evidence taken thereafter by means of the ongoing intrusion cannot be justified by medical necessity. The urine sample obtained by Senior Chief Burton and tested at the Navy Drug Lab was not drawn or used for any medical purpose; it was drawn solely for a law enforcement purpose. According to Senior Judge Mollison, once the medical purpose for the catheterization ceased, Petitioner was entitled to have the procedure stopped and the apparatus immediately removed. When the nurse left the catheter in place to capture the second urine sample, she was not acting for any valid medical purpose. Therefore collection of the second sample was prohibited by military case law holding that catheterization of a protesting service member infringes upon fundamental standards of decency in law enforcement and violates due process.

Chief Judge Larson concurred separately to address Senior Judge Mollison's dissent. In his view, the catheterization in this case was initially justified by a valid medical purpose. Any extension to accommodate law enforcement was *de minimis*, and thus reasonable under the Fourth Amendment. He further stated that *Rochin* did not

apply because the initial intrusion was for a medical purpose and not solely for a law enforcement purpose.

The Court of Appeals for the Armed Forces unanimously affirmed, holding that there was no violation of petitioner's rights under the Fourth Amendment, the Due Process Clause of the Fifth Amendment, or the Military Rules of Evidence. The Court reasoned that the catheter was initially implanted for a valid medical purpose by qualified medical personnel. The criminal investigator's request to prolong the procedure to gather a sample for law enforcement purposes was a *de minimis* intrusion, which did not shock the conscience.

REASON FOR GRANTING THE PETITION

This Case Presents a New and Important Question in the Area of Intrusive Body Searches and Seizures.

This Court has decided only four search and seizure cases involving the involuntary removal of evidence from within the human body. *See Winston v. Lee*, 470 U.S. 753 (1985)(compelled surgical removal of a bullet); *Schmerber v. California*, 384 U.S. 757 (1966)(involuntary blood extraction by hypodermic needle); *Breithaupt v. Abram*, 352 U.S. 432 (1957)(same); *Rochin v. California* (forced regurgitation to recover contraband). Two analogous cases have addressed body searches and seizures in special contexts. *See United States v. Montoya De Hernandez*, 473 U.S. 531 (1985)(monitored bowel movement at border to detect drug smuggling); *Bell v. Wolfish*, 441 U.S. 520 (1978)(prison visual body cavity search). Urinalysis has been the subject of several recent decisions. *See Vernonia School Dist. v. Acton*, No. 94-590 (June 26,

1995)(upholding school drug policy which authorized random urinalysis of student athletes); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989)(upholding random urinalysis drug testing of federal customs officers who carry arms or are involved in drug interdiction); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989)(upholding suspicionless urinalysis drug testing of railroad personnel involved in train accidents). However, this Court has never decided a case involving a forced collection of urine by catheter.

This is an important issue in military justice. Military Rule of Evidence 312 permits the forcible extraction of body fluids under certain circumstances, including: (1) by search warrant or authorization, (2) without search warrant or authorization when it is clear that evidence of crime will be found and delay could result in the destruction of the evidence, and (3) for valid medical purposes necessary to preserve the health of a servicemember. *See* Mil.R.Evid. 312(d), (f). Involuntary extractions of body fluids must be done in a reasonable fashion by a person with appropriate medical qualifications. Mil.R. Evid. 312(d), (g).

At issue in this case is whether an involuntary extraction of urine by catheter, initiated for a valid medical purpose under Mil.R.Evid. 312(f) and prolonged at the request of law enforcement personnel pursuant to Mil.R.Evid. 312(d), may nonetheless be unconstitutional. Before promulgation of the Military Rules of Evidence in 1980, military law prohibited the forcible extraction of urine by catheter from a conscious, protesting servicemember. *See United States v. Speight*, 5 U.S.C.M.A. 668, 18 C.M.R. 292 (C.M.A. 1955); *United States v. Jones*, 5 U.S.C.M.A. 537, 18 C.M.R. 161 (C.M.A.

1955); *United States v. Williamson*, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (C.M.A. 1954). This prohibition was based in part on *Rochin*. *See Williamson*, 4 U.S.C.M.A. at 333-34, 15 C.M.R. at 333-34 (Quinn, C.J., dissenting); *see also Jones*, 5 U.S.C.M.A. at 539, 18 C.M.R. at 163 ("For all practical purposes [Judge Quinn's] dissents have now become the law of the Court"). Military Rule of Evidence 312 was intended to incorporate *Rochin* and recognize society's particularly sensitive attitude in this area. Manual for Courts-Martial, United States, App. 22, M.R.E. 312(b) at A22-18 (1984). Therefore, meeting the requirements of Rule 312 is necessary but not sufficient to pass constitutional muster. *See* S. Saltzburg et al, Military Rules of Evidence Manual 286 (3d ed. 1991).

The Court of Appeals for the Armed Forces erred in finding that the involuntary catheterization of Petitioner in this case was reasonable under the Fourth Amendment and did not shock the conscience under *Rochin*. Petitioner was taken to the Naval Hospital Emergency Room for suspected drug abuse. Catheterization was started for a valid medical purpose under Mil.R.Evid. 312(f). However, it was prolonged at the request of a criminal investigator. Once the first bottle was full of urine, the valid medical purpose was fulfilled. Any urine collected thereafter was not collected for a medical purpose, but solely for a law enforcement purpose. Prolonging the involuntary catheterization for a law enforcement purpose, even if properly authorized under Mil.R.Evid. 312(d), was an unreasonable method of evidence collection under the Fourth Amendment and shocks the conscience under *Rochin*.

The Fourth Amendment protects personal privacy and dignity against unwarranted intrusion by the State.

Schmerber, 384 U.S. at 767. The Amendment's "proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Id.* at 768. The ultimate measure of the constitutionality of a governmental search is "reasonableness." *See Vernonia School Dist.*, slip op. at 11. Where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. *Id.* at 11-12.

In *Winston v. Lee*, this Court applied the *Schmerber* balancing test to evaluate the reasonableness of a surgical intrusion beneath the skin to extract evidence of a crime. 470 U.S. at 760-66. The test balances the individual's interest in privacy and security against society's interests in conducting the procedure. *Id.* at 760. Relevant questions include: Is there a search warrant? To what extent will the procedure threaten the safety or health of the individual? What is the extent of the intrusion upon the individual's dignity, privacy and bodily integrity? What is the community's interest in fairly and accurately determining guilt or innocence?

Application of the *Schmerber* balancing test to this case, shows that this urinalysis by forced catheterization was an unreasonable search and seizure. The initial intrusion and collection of the first urine sample was for a valid medical purpose, and thus did not require a search warrant or authorization. *See* Mil.R.Evid. 312(f). It is unclear from the record who authorized Senior Chief

Burton to get the second urine sample from Petitioner. Thus the Government did not establish that collection of the second urine sample was properly authorized under Mil.R.Evid. 312(d). Even if collection of the second urine sample was properly authorized, forcible collection by catheter was not authorized. In the Navy, urine collection compelled by command search authorization is normally done by natural evacuation. Forced catheterization threatened Petitioner's physical and mental health. Catheterization involves more physical discomfort than a blood test, there is a slight risk of urinary tract infection, and there is a psychological impact on the male subconscious fear of castration and unconscious fear of infection. *Williamson*, 4 U.S.C.M.A. at 329, 15 C.M.R. at 329 (Brosman, J. concurring). The effect on Petitioner's privacy, dignity, and bodily integrity was traumatic. The most private part of his body was invaded in a degrading public spectacle. The community interest in fairly and accurately determining guilt or innocence by forced catheterization is insignificant in this case. Forced catheterization was not necessary to obtain a sample of Petitioner's urine. The Government could have introduced the diagnostic test results from the hospital laboratory. It could have waited until Petitioner was capable of natural urination. These alternatives would have been no less effective in the quantity or quality of evidence gathered and would have been much less intrusive.

The forceful use of a catheter to obtain urine is a gross personal indignity. *See Yanez v. Romero*, 619 F.2d 851, 855 (10th Cir. 1980). Its use as a method of evidence collection offends civilized notions of common decency, fairness and justice. As stated by Chief Judge Quinn in his dissent in *Williamson*:

> In the Rochin case a stomach pump was used instead of a catheter. If anything, it seems to me that of the two, the use of the catheter would be the more reprehensible. Such an invasion of the inherent right of privacy of every human being is prohibited not only by the Fifth Amendment to the Constitution of the United States and by the provisions of the Uniform Code of Military Justice, but by natural and divine law as well. The precepts of natural law and the law of nature which long preceded the adoption of the Bill of Rights revolt at the practice approved by the majority in this case.
>
> * * * * * *
>
> The entire genius of our American institutions, the guarantees of the Bill of Rights, the protections of the Uniform Code of Military Justice, all combine to establish the truth of the aphorism "that a man's home is his castle." A fortiori then, these inalienable rights, which are implicit in the Law of Nature, and of Nature's God, demand that the sanctity of the human body, made in the image and likeness of God -- the temple of his immortal soul -- be and remain forever sacred and inviolate.

4 U.S.C.M.A. at 334-35, 15 C.M.R. at 334-35.

"In our culture the excretory functions are shielded by more or less absolute privacy." *See Vernonia School*

Dist., slip op. at 47 (O'Connor, J., dissenting), quoting Fried, Privacy, 77 Yale L. J. 475, 487 (1968). Hence, state-compelled, state-monitored collection and testing of urine, even when the urine is evacuated naturally, is particularly destructive of privacy and offensive to personal dignity. *See Vernonia School Dist.*, slip op. at 46-47 (O'Connor, J., dissenting). Forced catheterization was an unacceptable method of evidence collection in this case. Petitioner could have produced urine through natural evacuation given time and water. No evidence would have been lost, and Petitioner's dignity would have been preserved. Instead, law enforcement authorities turned the evidence collection process into a degrading public spectacle. This shocks the conscience under *Rochin* and thus violates the Due Process Clause of the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD BARRY GOODMAN
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September 1995

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

USCMA Dkt. No. 94-0204/NA
CMR Dkt. No. 92-00815

UNITED STATES,
APPELLEE

v.

TERRY S. FITTEN,
APPELLANT

Argued February 14, 1995
Decided June 12, 1995

For Appellant: *Lieutenant Commander Howard B. Goodman*, JAGC, USN (argued); *Lieutenant James A. Douglas*, JAGC, USNR (on brief).

For Appellee: *Lieutenant Andrew J. Waghorn*, JAGC, USNR (argued); *Colonel J. Composto*, USMC, *Commander S. A. Stallings*, JAGC, USN, and *Lieutenant J. M. Kegelmeyer*, JAGC, USNR (on brief); *Colonel T.G. Hess*, USMC

Opinion of the Court

CRAWFORD, Judge:

1. Pursuant to his pleas, appellant was found guilty of absence without leave, and pursuant to his conditional

pleas, he was found guilty of wrongful use of cocaine and wrongful use of marijuana, all in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 USC §§ 886 and 912a, respectively. The convening authority approved the sentence of bad-conduct discharge, 45 days' confinement, and reduction to the lowest enlisted grade. The Court of Military Review[1] affirmed the findings and sentence. 39 M.J. 659 (1993). We granted review of the following issue:[2]

> WHETHER PROTRACTED CATHERIZATION, CONDUCTED OVER THE PROTESTS OF THE SERVICEMEMBER AND SOLELY FOR THE PURPOSE OF GATHERING EVIDENCE OF MISCONDUCT, INFRINGES ON AN ACCUSED'S CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE.

2. We hold that there was no violation of appellant's rights under the Fourth Amendment, the Due Process Clause of the Fifth Amendment, or the Military Rules of Evidence.

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[1] *See* 41 M.J. 213, 229 n. * (1994).

[2] The second issue concerning the independence of the intermediate appellate court judges was resolved against appellant in *United States v. Mitchell*, 39 M.J. 131 (CMA 1994), *cert. denied*, ___ U.S. ___, 130 L. Ed. 2d 131, 115 S. Ct. 200 (1994).

FACTS

3. On December 16, 1991, appellant was admitted to the Balboa Naval Hospital, San Diego, California. The attending physician, Dr. Dirk W. Woods, and the nurse, Ms. Margaret Broadwell, who examined appellant upon his arrival, testified that he was loud, disoriented, and combative. Dr. Woods quickly ordered appellant placed in a limited restraint to immobilize his neck and back because of a suspected physical trauma. He then ordered a CAT scan to detect physical injuries and a metabolic screen testing for drugs or alcohol in the blood. These tests are performed to ensure there is no life-threatening trauma or injury. Appellant was placed in a rigid brace called a Philadelphia collar and placed on a spine board to avoid any neck or spinal column injuries. He was also secured in a four-point leather restraining device to prevent him from getting off the gurney. Because appellant was either unable or unwilling to provide a urine sample, Dr. Woods instructed Ms. Broadwell to obtain a urine sample by catheter. This procedure was ordered only after the emergency room personnel were unable to obtain a sample for over 1 1/2 hours after appellant's arrival.

4. At the same time the order to obtain a urine sample was made at the hospital, Senior Chief Rodney A. Burton, the command's urinalysis coordinator, was sent to the hospital to obtain a specimen of appellant's urine. Appellant refused to give a urine sample to Senior Chief Burton. Ms. Broadwell told Senior Chief Burton that appellant said he had a "drug weekend." Senior Chief Burton then left the emergency room and called Lieutenant Commander Clopton, the Command Staff Judge Advocate, to inform him of this statement and sought to get a commander's authorization to obtain a urine sample.

5. Before the catheterization process started, the station commander authorized a search based on probable cause. The record is silent as to whether this search authorization directed catheterization or envisioned an order to appellant to give a urine sample. In any event, Ms. Broadwell continued the process of catheterization because "it was important that we find out what was wrong" with appellant. She testified that this authorization "played no role" in her actions to catheterize appellant. She then obtained one bottle of appellant's urine for the hospital and, based upon Senior Chief Burton's request, obtained a second bottle for the unit. It is this second bottle that produced the evidence resulting in preferral of charges against appellant.

6. The judge found "that Dr. Woods ordered, and Nurse Broadwell performed, a catheterization of Petty Officer Fitten solely for authorized medical purposes."

DISCUSSION

7. The Fourth Amendment protects appellant against unreasonable searches and seizures. Appellant is also protected therefrom by the Due Process Clause of the Fifth Amendment and the Military Rules of Evidence in the Manual for Courts-Martial, United States, 1984.

8. Appellant claims that the judge erred by violating his rights under the Due Process Clause, citing *Rochin v. California*, 342 U.S. 165 (1952); Mil.R.Evid. 312(d) and (f). In this instance the involuntary catheterization was primarily for medical reasons. Two samples were drawn, one for the hospital and one for the command investigator.

9. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

10. The right includes protection of the "dignitary interests in personal privacy and bodily integrity." *Winston v. Lee*, 470 U.S. 753, 761 (1985). There are two clauses to the Fourth Amendment that secure the protection of these privacy interests: first the reasonableness clause, and second, the warrant clause. As the Supreme Court and this Court over a period of years have indicated, there is a preference for warranted searches absent exigent circumstances. *See, e.g., Katz v. United States*, 389 U.S. 347 (1967). In this case we shall examine this warrantless search in light of the reasonableness clause together with the Fifth Amendment Due Process Clause.

11. The seminal case addressing removal of evidence from the human body is *Rochin v. California*, 342 U.S. 165 (1952). The Court held in *Rochin* that evidence obtained in violation of the Due Process Clause of the Fourteenth Amendment was not admissible in evidence. The police officers entered Rochin's home and broke into his bedroom where they observed him swallowing two capsules. In attempting to obtain those two capsules, the police grabbed his throat and stuck a finger in his mouth. (225 P.2d 1-2 (Cal. App. 1950)). When that was unsuccessful, they handcuffed him and took him to a

hospital where an emetic solution was forced into his stomach through a tube, causing him to regurgitate the capsules. *Id.* at 166. In holding there was a violation of the Due Process Clause, the Court concluded:

> The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.
>
> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents--this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172 (citation omitted).

12. In *Schmerber v. California*, 384 U.S. 757 (1966), the Court upheld the taking of a blood sample from an arrested defendant at a hospital to determine whether he was operating an automobile under the influence of alcohol. The Court examined a number of factors after concluding that there was probable cause for arrest Id. at 768. First, the Court emphasized that there was a "clear indication" that evidence of intoxication would be "found." Id. at 770. Second, the Court noted that "a reasonable" test was chosen which was highly reliable and "virtually" without "risk, trauma, or pain." Finally, the Court recognized that the test was performed "by a physician in a hospital environment according to accepted medical practices." *Id.* at 771. The Court did acknowledge that "serious questions ... would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment ...." *Id.* at 771-72.[3]

13. In *Winston v. Lee*, 470 U.S. 753, the Court struck down a warrant permitting surgery to remove a bullet that was embedded "approximately one inch" into the "muscular tissue" of defendant's chest. This surgery would have required general anesthesia. *Id.* at 757. The Court noted that, even though there was probable cause, "a search for evidence of a crime may be unjustifiable if it endangers the

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[3] *See, e.g., United States ex rel. Guy v. McCauley*, 385 F. Supp. 193, 199 (E.D. Wis. 1974)(court struck down a vaginal search of an incarcerated female because it was not conducted by "skilled medical technicians"). *Compare Ewing v. State*, 310 N.E.2d 571 (Ind. App. 1974)(upheld warrantless taking of urine sample) *with People v. Williams*, 557 P.2d 399 (Colo. 1976)(contra).

life or health of the suspect." *Id.* at 761. The majority pointed out that the surgery arguably posed serious medical risks. *Id.* at 766. Additionally the prosecution had "available substantial additional evidence" that the respondent committed the robbery. *Id.* at 765. Finally, the Court noted that, even if the bullet was retrieved, there was some question that it would provide probative evidence of the crime. *Id.* at 766 n. 10.

14. In *Mincey v. Arizona*, 437 U.S. 385, 392 (1978), the Court recognized that "the need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency[,]" *quoting Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir.) (opinion of Burger, J.), *cert. denied*, 375 U.S. 860 (1963). Courts following this rationale have indicated that a warrantless search to prevent death or serious injury to a suspect is permissible. *Cf. United States v. Maxwell*, 38 M.J. 148 (CMA 1993), *cert. denied*, 114 S. Ct. 1056 (1994); *United States v. Borchardt*, 809 F.2d 1115, 1117 (5th Cir. 1987); *Harrison v. State*, 860 P.2d 1280, 1283 (Alaska App. 1993); *People v. Bracamonte*, 15 Cal. 3d 394, 124 Cal. Rptr. 528, 540 P.2d 624 (1975); *People v. Jones*, 20 Cal. App. 3d 201, 97 Cal. Rptr. 492 (1971).

15. These cases form a basis for Mil.R.Evid. 312(f), which provides:

> *Intrusions for valid medical purposes.* Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion

> conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil.R.Evid. 311.

16. Here, the taking of the body fluid from appellant was motivated by medical personnel concerned for appellant's health. The testing was not directed by the command or law enforcement officials. Rather, the test was conducted by medical personnel in a medical environment. The test was reasonably necessary to determine if there was life-threatening trauma or injury as a result of drugs or alcohol in the blood. The desires of the command had no impact on the initial intrusion and did not cause any additional intrusion. On the contrary, the command's request resulted in a *de minimis* impact by prolonging the flow of urine only long enough to fill a second bottle.

17. There was a valid medical purpose for the catheterization procedure. It was performed in a hospital by medical personnel. Any "intrusion" was *de minimis* and does not shock the conscience. For these reasons we hold that there was no violation of appellant's rights under the Fourth Amendment, the Due Process Clause of the Fifth Amendment, or the Military Rules of Evidence.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, GIERKE, and WISS concur.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVAL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

DAVID C. LARSON EDWIN W. WELCH
R.M. MOLLISON

UNITED STATES

V.

TERRY S. FITTEN, 276-66-5673
Mess Management Specialist Third Class (E-4),
U.S. Navy

NMCM 92 0815 Decided October 26, 1993

Sentence adjudged 5 February 1992. Military Judge: H.B. Smith. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Training Center, San Diego, CA 92133.

LT JAMES A. DOUGLAS, JAGC, USNR, Appellate Defense Counsel.

LT J.M. KEGELMEYER, JAGC, USNR, Appellate Government Counsel.

WELCH, Senior Judge:

The appellant, in his first assignment of error, challenges the propriety of using evidence obtained by his forced catheterization at U.S. Naval Hospital, San Diego.[1] The urine extracted from the appellant provided evidence of his use of cocaine and marijuana.[2] Appellant's conviction was based on his plea of guilty to unauthorized absence

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[1] I. THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS EVIDENCE DERIVED FROM THE FORCED CATHETERIZATION OF APPELLANT IN THAT THE PROCEDURE, UNNECESSARY AND UNREASONABLY INTRUSIVE, VIOLATED DUE PROCESS. (FOOTNOTE OMITTED.)

II. THE COURT-MARTIAL HAD NO JURISDICTION BECAUSE THE MILITARY JUDGE'S LACK OF A FIXED TERM OF OFFICE LEFT THE MILITARY JUDGE INSUFFICIENTLY INDEPENDENT TO SATISFY THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE. (CITATION OMITTED.) BECAUSE THE ERROR IS JURISDICTIONAL AND THE RECORD CONTAINS NO EVIDENCE OF A KNOWING WAIVER OF APPELLANT'S RIGHT TO AN INDEPENDENT MILITARY JUDGE, THE ISSUE IS NOT WAIVED EVEN THOUGH IT WAS NOT RAISED AT TRIAL.

III. THE COURT-MARTIAL LACKED JURISDICTION BECAUSE APPELLANT'S MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. (CITATIONS AND FOOTNOTE OMITTED.) BECAUSE THIS ERROR IS JURISDICTIONAL, THE ISSUE IS NOT WAIVED EVEN THOUGH IT WAS NOT RAISED AT TRIAL.

[2] Appellant was convicted by special court-martial of violating Articles 86 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886 and 912a, respectively, by unauthorized absence, and illegally using marijuana and cocaine. The judge sentenced him to 45 days confinement, reduction to pay grade E-1, and a bad-conduct discharge, which was approved by the convening authority.

and his conditional plea of guilty to the wrongful use of cocaine and marijuana. His conditional plea was entered after the judge denied his motion to suppress the results of tests performed on the urine obtained by catheterization. We hold that the judge properly denied the motion to suppress evidence. Our reasoning follows.

I. *The Factual Setting*

At approximately 1000, 16 December 1991, the appellant turned himself in at the Chaplain's Office at Naval Station, San Diego. He appeared to be under the influence of an unknown substance.

At approximately 1030, he was taken to the Branch Medical Clinic at Naval Training Center, San Diego, and given a competence for duty examination. He was found unfit for duty due to the use of drugs or alcohol.

At approximately 1300, he was transported to U.S. Naval Hospital, San Diego. Dr. W, a medical officer, saw appellant upon arrival. He observed that appellant was intermittently obtunded (not acting normally; in an altered mental status -- "like . . . psychiatrically ill, intoxicated, what ever") and combative (striking out, moving about, and talking in a very loud tone or yelling). Because such action might be caused by anything from metabolic deficiencies to head injuries to drug intoxication, Dr. W's initial treatment included (a) a metabolic screen to test for different chemicals in the blood, (b) a C-spine precaution (placing appellant in a rigid brace -- a "Philadelphia collar" -- that prevents movement of the neck, and strapping the appellant to a spine board), (c) ordering a CAT scan of the appellant's brain, and (d) ordering a dangerous drug screen. Record at 10-13.

At U.S. Naval Hospital, San Diego, dangerous drug screening tests are done using urine specimens because blood testing is not readily available. If a patient-service member is either unwilling or unable to provide a urine specimen, and the patient's condition is potentially life threatening, the practice generally followed at the hospital is to obtain a urine specimen by catheterization. Record at 13. Dr. W ordered such testing of the appellant because the appellant's behavior was potentially drug related and symptomatic of a life threatening situation. Record at 14. In response to questions by the trial judge, Dr. W explained the dichotomy that exists when a patient does not consent to providing a urine specimen and the physician concludes that obtaining a specimen is necessary. If the patient is a civilian, the civilian can say "No. I don't want you to do it." and sign out against medical advice. Not so with an active duty military patient:

> [W]e are required by our military law to perform what we think is in their best interest medically. There are some gray lines on it -- in that area, but in a case like this, it's pretty clear-cut that they don't have a right to sign out against medical advice and they need to have that test done.

Record at 21.

The order to catheterize appellant was given within the first hour after his arrival in the emergency room. According to Dr. W, it is important to have catheterization done quickly in situations like the appellant's in case there is a toxin in the patient's body. Additionally, in his opinion, the "standard of care" requires that information from a dangerous drug screen be obtained within the first

couple hours of the patient's stay in the emergency room. Tests results of urine obtained by catheterization are normally known within 15 to 30 minutes after the specimen is obtained from the patient. Record at 18-19.

Mrs. B, a licensed civilian nurse, who started caring for the appellant when he arrived in the emergency room, performed the catheterization. She had performed literally hundreds of catheterizations, a procedure done daily in the emergency room. On any given day, she might do 10 or more. Nurse B's description of the appellant's actions in the emergency room includes the following:

> Mr. Fitten was disoriented . . . very abusive both verbally and physically, combative, striking out, at one point, catching me, slapping me with the backhand across my face, hitting my jaw . . . [W]e had extreme difficulty trying to get the IV lines in. We were uncertain of what was wrong with Mr. Fitten at this point. We weren't sure if it was alcohol or drugs or closed head injury, anything at this point.

Record at 24. When appellant continued his combative conduct, Nurse B ordered that soft restraints be applied by corpsmen to keep the appellant from pulling IV lines out. Appellant attempted to pull the IV lines out and ripped off the soft restraints. When Nurse B's next efforts to calm the appellant failed, she ordered the corpsmen to apply "four point" leather restraints for the appellant's safety and the safety of hospital personnel; such restraints are frequently used in emergency rooms to control abusive patients. At the time, Nurse B was assisted by three corpsmen; several security personnel were also present.

After the appellant arrived at the emergency room, Nurse B asked him several times if he would provide a urine specimen. The appellant was either unable or unwilling to provide the requested specimen. Thus, after about an hour and one half of attempting to obtain a voluntarily provided specimen from the appellant, Nurse B catheterized the appellant based on a doctor's order. Record at 25. She began the process by swabbing the appellant's penis three times with betadine, an antiseptic, and explaining the process to the appellant. At that time, appellant had calmed down somewhat; he was talking to Nurse B; he was relaxed a bit. Nurse B testified that the appellant never made any verbal protest to her concerning the procedure and that he was cooperative. Record at 25-28. Parenthetically, we add (a) that Nurse B candidly testified that "when you have somebody's penis in your hand, they're not going to fight a whole bunch," and (b) that the appellant later testified that he had tears in his eyes during the process.

Nurse B inserted the appropriate tubing into appellant's penis and withdrew urine from his bladder. The process took "just a couple of minutes." Record at 32. Nurse B collected two containers of urine while the tubing remained inserted. There was "no time difference between" the collection of the "bottle A" specimen and the "bottle B" specimen because there was a continual drip of urine coming out of the tubing. Record at 27.

While Nurse B was conducting the catheterization, Senior Chief C was nearby. He was the appellant's command's chief investigator, as well as the urinalysis coordinator. He had been sent to the hospital at about 1300 to attempt to obtain, with the appellant's consent, a specimen of the appellant's urine. The appellant had

refused to voluntarily contribute a specimen. After the appellant refused to voluntarily comply with Senior Chief C's request, Senior Chief C was advised by Nurse B that the appellant had mentioned to her that he had a "drug weekend." Record at 38. Senior Chief C conveyed this information to the appellant's command's staff judge advocate by telephone. Soon thereafter, the staff judge advocate called back to Senior Chief C and told him that appellant's commanding officer had authorized a probable cause search of the appellant's urine. Record at 38-39. *See also* App. Ex. I and II.

The commanding officer's authorization to search based upon probable cause was conveyed to Senior Chief C moments before the catheterization was started. Nothing in the record indicates the authorization directed a catheterization, leaving open the inference that the commanding officer's intent could have been that the appellant be ordered to produce a specimen and that the Senior Chief standby with bottle in hand. Nevertheless, Senior Chief C told Nurse B that he had permission to get a sample of the appellant's urine. Record at 40. While Senior Chief C was talking to the staff judge advocate, Nurse B continued the process of catheterization because, in her words, "[it] was important that we find out what was wrong with Mr. Fitten so I continued." Record at 27. *The order from appellant's command "played no role" in Nurse B's decision to catheterize him -- she was going to do it with or without approval of the appellant's command.* Record at 34.

After obtaining urine for the dangerous drug screening test in "bottle A", Nurse B asked Senior Chief C for his bottle, "bottle B." She then let some of appellant's urine drip from the tubing into bottle B. Thereafter, Nurse B

looked at bottle B and said "I'm not sure if this is enough," and poured some of the urine from bottle A into bottle B while commenting "[t]his is more than enough for us and this should be enough for your sample." Record at 38. Urinalysis testing of the content of bottle B later produced the evidence that led to the preferral of charges against the appellant.

II. *Prosecution Based on Evidence Obtained From Forced Catheterization*

The appellant contends that the trial judge erred when he denied his motion to suppress evidence derived from appellant's forced catheterization. According to the appellant, obtaining evidence in this manner was unnecessary and unreasonably intrusive, and in violation of due process of law. He cites as dispositive *Rochin v. California*, 342 U.S. 165 (1952), discussed below, and Mil.R.Evid. 312(d), which states in part that "[i]nvoluntary extraction of body fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications."[3]

The Government responds that the appellant's urine was properly obtained for a valid medical purpose, as authorized by Mil.R.Evid. 312(f), which states:

> *Intrusions for valid medical purposes.* Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be

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[3] At trial, the defense counsel advised the judge that the issue presented was "very narrow. We're not arguing that there was not a proper search authorization." Record at 7.

> necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil.R.Evid. 311.

On 21 May 1954, a divided United States Court of Military Appeals discussed at length the use of evidence obtained as a result of catheterization of a service member. *See United States v. Williamson*, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954); *United States v. Booker*, 4 U.S.C.M.A. 335, 15 C.M.R. 335 (1954). In *Williamson*, the Court held that the results of urinalysis of a specimen obtained from an unconscious service member could be used in evidence against him without violating his right against self-incrimination. In *Booker*, the Court held that the results of catheterization of a service member with his consent could be used in evidence against him. Obviously, neither case is on "all fours" with appellant's case. However, in *Williamson* each judge discussed *Rochin* (holding that use of evidence obtained by pumping the accused's stomach was a violation of due process of law because it "shocks the conscience"), with Judge Brosman stating:

> If the case before us involved real evidence obtained from an accused person by use of a catheter and over his protest, I should similarly conclude that fundamental standards of decency in law enforcement has been infringed, and that a conviction predicated in any part on such evidence violated the concept of "military due

process."

Williamson 4 U.S.C.M.A. at 329, 15 C.M.R. 320.

If the appellant had presented us with a pure case of a commanding officer directing a probable cause search by catheterization of an obviously healthy service member, we would probably quote the words of Judge Brosman and rule in appellant's favor. But that is not the case before us. The testimony of Dr. W and Nurse B convinces us that appellant was subjected to involuntary catheterization solely on the basis of medical necessity (the appellant displayed signs indicative of drug use and the emergency room physician needed to determine the nature of the substance in the appellant's body to assure that appellant did not die).

We fine-tune the issue raised by the appellant by noting that urine from appellant's bladder eventually went in two directions: "bottle A" to the hospital technicians and "bottle B" to the drug screening laboratory to build a case against the appellant. When faced with a similar situation, albeit not involving catheterization, the U.S. Air Force Court of Military Review held "that once the government lawfully possesses a urine sample it may conduct any laboratory test for drugs it wishes on the specimen." *United States v. Jenkins*, 24 M.J. 846, 848 (A.F.C.M.R. 1987), *citing United States v. Nand*, 17 M.J. 936, 937 (A.F.C.M.R. 1984), which states "[t]he fact that a portion of the urine sample was used for another purpose is irrelevant since the sample was validly taken." *See also United States v. Cannon*, 29 M.J. 549, 554 (A.F.C.M.R. 1989).

Although we agree with the principles stated in the

above cited cases, none of them squarely address questions raised by the logical observation that catheterization may be prolonged for some brief period of time if a "bottle B" is partially filled for forensic testing. Frankly, our conscience is not "shocked" by such conduct. We believe that concerns expressed in *Rochin* and *Williamson* are allayed when forced catheterization is initiated by appropriately qualified service medical personnel acting to save the life of a service member. Under these circumstances, we find no support in law or reason for a *per se* rule excluding evidence captured in a "bottle B," either from the direct flow from the end of the tubing used or from decantation. Rather, in such cases, we will examine all the circumstances to determine the reasonableness of the action taken and the legal basis for admission of evidence of urinalysis testing.

In this case -- reminiscent of a proverbial law school examination question, based in part on Nurse B's pouring of urine from "bottle A" to "bottle B" -- we find two alternative grounds for upholding the judge's ruling. First, we find that the urine in "bottle B" contained an undetermined, but significant, amount of appellant's urine that had been properly captured for a valid medical reason in "bottle A." Thus, we conclude that the urine obtained was in essence all one sample extracted during an intrusion conducted for a valid medical purpose; *ergo*, the evidence was admissible under Mil.R.Evid. 312(f) and the principles in *Jenkins, Nand,* and *Cannon*. Alternatively, we find that the appellant's urine was obtained in a reasonable fashion -- reasonable because catheterization was required as part of an effort to preserve his life -- by a person with appropriate medical qualification, and pursuant to a proper command authorized probable cause search per Mil.R.Evid. 315; *ergo*, the evidence was admissible under Mil.R.Evid.

312(d) and need not have been excluded under the principles of *Rochin*. Thus, we conclude that the first assignment of error is without merit.

III. *Other Assignments of Error*

The remaining assignments of error also lack merit. *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2412 (1993); *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992).

The findings and sentence, as approved on review below, are affirmed.

LARSON, Chief Judge (concurring):

I concur that the results of the urinalysis conducted in this case were admissible under Mil.R.Evid. 312(f). I write separately only to address the principal argument advanced by Senior Judge Mollison in dissent. His position draws a bright line between urine drawn for medical purposes and that drawn for purposes of prosecution. He finds that this latter urine is not covered by Mil.R.Evid. 312(f) and that there is no other basis for admissibility adequately developed on the record.

I do agree that a line can be drawn to separate those bodily fluid extractions which violate the Fourth Amendment and those that do not. However, the distinction should be between an intrusion into the body for medical purposes and one for purposes of prosecution, not between the uses of the urine obtained as the result of a lawful intrusion. Once the intrusion is made for a valid medical purpose, I read Mil.R.Evid. 312(f) to permit any

use to be made of the evidence (*i.e.*, urine) obtained thereby. In this case, the intrusion was made and urine was extracted for a valid medical purpose. The brief collection of an additional amount of urine immediately following the medical collection did not, to any appreciable degree, constitute a separate search or seizure for Fourth Amendment purposes.[1]

Furthermore, even if the extraction of additional urine could be considered a separate "seizure" under the Fourth Amendment, in view of the facts that it required no further intrusion into the body of the appellant and that the catheter remained inserted only for a very brief additional period of time, I find the additional invasion of the appellant's privacy interests to be minimal and the seizure to be reasonable and therefore, not in violation of the appellant's rights under the Fourth Amendment. In fact, I see little difference between this situation and one where urine extracted for medical testing is thereafter turned over to law enforcement officials as criminal evidence. *United States v. Miller*, 15 U.S.C.M.A. 320, 35 C.M.R. 292 (1965).

Drawing a distinction in terms of the purpose of the intrusion rather than the purpose of the extracted urine would also be consistent with the case law cited in the

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[1] A different result may be obtained if the catheter were left inserted for a significant period of time as, for example, where medical personnel have finished their seizure but agree to wait for guidance from law enforcement officials. At some point in time, the medical purpose for the intrusion would lapse and the seizure of additional urine as criminal evidence would no longer be covered by Mil.R.Evid. 312(f). In this case, we need not determine where that point in time is because the additional extraction of the appellant's urine was apparently accomplished immediately with no interruption in the flow through the catheter.

dissent. In every case cited by Senior Judge Mollison in support of his position, the original intrusion was made expressly for law enforcement purposes. *See, e.g., United States v. Jones*, 5 U.S.C.M.A. 537, 18 C.M.R. 161 (1955). Only in that situation is it necessary, for legal analysis purposes, to determine another basis for admission (e.g., command authorization based on probable cause) and to consider the "shock the conscience" circumstances typified in *Rochin v. California*, 342 U.S. 165 (1952). We do not have that situation here.

MOLLISON, Senior Judge (dissenting):

The principal issue in this appeal from a special court-martial conviction for wrongful use of controlled substances is whether the military judge erred in denying the appellant's motion to suppress the results of a urinalysis of a specimen extracted from the appellant by means of involuntary catheterization. I am of the opinion the military judge erred. I would set aside the findings of guilty and sentence and authorize a rehearing.

I.

Consistent with his pleas of guilty, the appellant was found guilty of one specification alleging a 2 1/2-hour unauthorized absence and two specifications alleging wrongful use of controlled substances, in violation of Articles 86 and 112a, respectively, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 886, 912a. The pleas of guilty to the drug offenses were entered conditionally after the appellant unsuccessfully moved to suppress the results of a urinalysis upon which those specifications were apparently based. Rule for Courts-Martial (R.C.M.) 910(a)(2), Manual for

Courts-Martial, United States, 1984. A military judge sitting alone sentenced the appellant to confinement for 45 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence without modification. UCMJ art. 60, 10 U.S.C. § 860. The appellant's case is now before this Court for review in accordance with Article 66, UCMJ, 10 U.S.C. § 866.

This Court may only affirm such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. UCMJ art. 66(c), 10 U.S.C. § 866(c). This Court may not set aside a finding of guilty or the sentence on the basis of an error of law unless the error is materially prejudicial to the substantial rights of the appellant. UCMJ art. 59(a), 10 U.S.C. § 959(a).

The appellant assigned the following error in the conduct of his court-martial:

> THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS EVIDENCE FROM THE FORCED CATHETERIZATION OF APPELLANT IN THAT THE PROCEDURE, UNNECESSARY AND UNREASONABLY INTRUSIVE, VIOLATED DUE PROCESS [citing *Rochin v. California*, 342 U.S. 165 (1952); Mil.R.Evid. 312(d)].

II.

Prior to entry of pleas, the appellant moved to suppress

a urinalysis on a specimen extracted by catheterization from him at the Balboa Naval Hospital in San Diego. R.C.M. 905(a)(3); Mil.R.Evid. 311(d). At a pre-trial session, conducted pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a), the parties called four witnesses and entered into a stipulation of fact. In sum, the evidence shows that urine was extracted from the appellant over his objection by means of a catheter inserted in his penis by a hospital nurse. Two specimens were drawn. One was retained by the hospital for testing, while a second specimen was immediately surrendered to a command investigator who was present during the catheterization. The specimen provided to the base investigator was eventually transported to a Navy drug laboratory for testing. Although the record is not entirely clear on this point, it appears that this second specimen tested positive for the presence of the metabolites of cocaine and marijuana, and it is on the basis of this test that the appellant was prosecuted. A more detailed statement of the evidence follows.

On Monday morning, 16 December 1991, the appellant turned himself in to the Chaplain's Office at Naval Station, San Diego. The appellant appeared to be under the influence of an unknown substance. Shortly thereafter, he was transported to the Branch Medical Clinic at Naval Training Center, San Diego where he was administered a competency for duty examination and was found unfit for duty due to the use of drugs or alcohol.[1] At 1300 the

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[1] The evidence derived from a mandatory urinalysis as a result of a competency for duty determination is admissible only for the purposes of impeachment and rebuttal. *United States v. Daskam*, 31 M.J. 77 (C.M.A. 1990). *See also United States v. Ouellette*, 16 M.J. 911 (N.M.C.M.R. 1983).

same day, the appellant was transported to the Balboa Naval Hospital for further evaluation and treatment. Stipulation of Fact, Appellate Exhibit III.

Lieutenant Woods, a medical officer on duty in the emergency room for a portion of the time the appellant was present there, testified that the appellant was noted upon presentation to be intermittently obtunded (not responsive to questioning or gentle stimuli)[2] and combative. The initial impression of the staff was that the appellant had an "altered mental status." A protocol is followed when a patient presents this status. Several causes for it must be considered, *i.e*, metabolic deficiencies, head injuries, drug intoxication. A work-up is embarked upon to ensure the causes are not life- or limb-threatening. Record at 12. Blood tests, a CAT-scan, immobilization, and a "dangerous drug screen" are parts of this protocol. According to Dr. Woods, all of these measures were ordered in the appellant's case by him. Record at 12-13.

Dr. Woods further explained that the "dangerous drug screen" is accomplished by urinalysis at this naval hospital. Blood testing is not available there. If the patient is unwilling to provide a urine specimen, if the patient is a military member, and if the patient's behavior is potentially life-threatening, a "catheterized urine specimen" is generally obtained. Record at 13, 21. A patient who is intermittently obtunded and combative is considered to be in a life-threatening condition. Record at 14.

The "catheterized urine specimen" is described by Dr.

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[2] Obtund: To dull or blunt, especially sensation or pain. Webster's New World Stedman's Concise Medical Dictionary 519 (1987).

Woods as one that:

> basically entails a corpsman, nurse or doctor, someone who is trained, will, you know, in a male, clean the tip of the penis off with a sterile solution called betadine and holding the penis with one hand will insert a tube that is slightly, maybe half the size of my little finger through the penis into the bladder. Urine returns at that point. As soon as the urine sample is obtained in a case like this, the catheter is generally withdrawn. It can also be inserted -- a balloon inflated. It can be left in other cases.

Record at 14. Catheterization is performed three to 12 times a day in the hospital. *Id.*

Dr. Woods also described the pain and risks associated with this procedure:

> I think most people that are not obtunded would describe it as uncomfortable. We do many things that are much more uncomfortable. I think there is a great deal of psychological overlay in a case like this with catheterization where people don't generally like having things stuck in their penis and the little bit of discomfort, I think, probably is magnified by many people with psychological overlay.

* * *

> Somebody who's truly obtunded and not playing at being obtunded, which sometimes we have difficulty assessing, then they wouldn't feel anything. If they were truly obtunded, part of the definition is that they don't respond to physical stimuli. Okay. If it's somebody who's just being difficult then they might -- then they would perhaps feel it the same amount that other people would and they would describe it as uncomfortable.

* * *

> The studies indicate that if you leave [the catheter] in for any length of time that the risk of infection is somewhere around one percent. The risk of doing what we call a quick catheter, or an in-and-out catheterization is somewhere below that, but I can't give you an exact amount.

Record at 15.

The catheterization of the appellant was ordered some time within the first hour of his stay at the hospital, however, Dr. Woods was not present when the catheterization was accomplished. Record at 16, 18-19. The record is not clear as to whether Dr. Woods personally ordered the catheterization. Record at 19. Dr. Woods also testified that he was not made aware that the appellant did not want to be catheterized, however, it would have made no difference and the hospital staff would have proceeded inasmuch as they still needed the information and the appellant "did not have the right to sign out against

medical advice." Record at 21.

The attending nurse, Ms. Margaret Broadwell, also testified. She stated the appellant was disoriented as to time and place. He was "very abusive both verbally and physically, combative, striking out." Record at 24. At one point he backhanded her across the face and hit her jaw. *Id.* She explained the staff was not sure whether the appellant was on alcohol or drugs or suffered from a closed head injury. A corpsman tried to start an "IV", but had extreme difficulty getting the lines in. The nurse talked to the appellant and he calmed down sufficiently for the insertion of the IV. The nurse returned later and again found the appellant "getting very, very combative." When the appellant attempted to pull out the IV lines, he was placed in soft restraints. When he ripped off the soft restraints and again started swinging and throwing his arms about trying to get off of the gurney, four-point leather restraints were applied. The appellant was also restrained by three corpsman and base security personnel. Record at 24-25.

The nurse testified that she had been instructed to obtain urine from the appellant from the time that he arrived. The nurse asked him several times whether he would provide a specimen, however, he "was either unable or wouldn't" provide a specimen. Record at 25. Between an hour and an hour and one-half after the appellant had been there, either the medical officer or an attending intern (the nurse cannot recall which) ordered a catheterized urine sample for a dangerous drug screen. Record at 25, 29. Though she customarily had a male corpsman perform the catheterization on male patients, the nurse elected to perform this catheterization on the appellant, herself, explaining the corpsmen were "shook up over the ordeal"

and the appellant seemed to respond to her voice better than he did to the corpsmen. Record at 30-31, 33. The nurse further testified that the appellant had calmed down considerably prior to the time the catheterization was performed. He "wasn't swearing quite as much," and he was a little more oriented. Record at 26. When the actual catheterization was performed, the appellant was "very, very calm," and, as the nurse explains, "[W]hen you have somebody's penis in your hand, they're not going to fight you a whole bunch . . ." Record at 28.

Prior to the catheterization of the appellant by the nurse, the nurse informed one of the chief petty officers accompanying the appellant that she was going to obtain a urine specimen "for my dangerous drug screen for medical purposes." Record at 27. The chief petty officer called someone and then informed her that he had authorization and asked her for a specimen. Record at 27, 30. The nurse then catheterized the appellant. She got a return, but the appellant's bladder was very dry. Nonetheless, the nurse collected two containers out of the same catheterization while the tube remained in the appellant's penis. The nurse sent one specimen to the hospital "stat lab" where a drug screen was performed. Record at 27. (The results of this urinalysis are not in the record.) According to the nurse, she then handed a specimen from the same catheter to the chief that was witnessing the catheterization. Record at 27. The nurse "only had a small enough sample to barely get enough for [the hospital] and the investigator." Record at 28. The nurse further testified that although she was informed the chief had some type of authorization, that fact played no role in her decision to catheterize the appellant. She was catheterizing the appellant pursuant to doctor's orders and would have done so with or without the chief's getting a

specimen. Record at 31, 34. According to the nurse, "it took just a matter of minutes" to acquire the urine specimens through the catheter. Record at 32. Finally, the nurse testified that the appellant was not sedated or administered any "pain killers." Therefore, she surmises that he would have felt the "limited pain involved with the catheterization." Record at 23-33.

Next Boatswain's Mate Senior Chief Burton testified. He was the Naval Training Command's chief investigator and urinalysis coordinator. He had been informed by a legalman that the legal officer, Lieutenant Commander Clopton, wanted the senior chief to try to get a specimen from the appellant. Senior Chief Burton went to the hospital for this purpose. He found the appellant in a bed nodding in and out of sleep. The appellant responded to the senior chief's request for a urine specimen by saying that he wanted to leave the hospital and by pulling on his IV. Record at 36. Once restrained, the appellant responded in the negative to a second request for a urine specimen. Record at 37. As the senior chief was walking out of the area to telephone the legal officer, the nurse informed him that the appellant had mentioned he had had a drug weekend. Record at 37. The senior chief telephoned the legal officer and related this information to him and asked whether that was probable cause to get a urine specimen. Record at 38. The legal officer informed the chief that he would have to check with "the boss" and would call him back. Five minutes later, the legal officer called the senior chief back and "said that they felt they had probable cause to go ahead and get a sample." Record at 38. The record does not state who "the boss" was, whether anyone in authority authorized the taking of a specimen, or whether that person authorized an extraction of body fluids by catheterization. In any case, the senior

chief hung up the telephone and returned to the space where the medical staff was preparing a catheter. Senior Chief Burton then testified:

> I told them I had permission to get a sample and if it was possible to get enough of a sample that I would like to get one. They used the catheter to get their's out and when she was done, she asked me for my bottle and what was left I got. And then she took a look at the amount that was in the bottle, and she said, "I'm not sure if this is enough," and she poured a little bit into the bottle. She said, "This is more than enough for us and this should be enough for your sample," and I took the sample from the nurse, put the lid on it, put the label on and put the seal on it, placed it in the box with the tape around the box and hand carried it over to the lab after I finished the paperwork.

Record at 38. As to whether the appellant verbally objected to the catheterization, the senior chief thought the appellant said, "I don't want that. I'm not having it." Record at 42.

Finally, the appellant took the stand and testified for the limited purpose of the motion to suppress. In substance, he testified that he refused the senior chief's request for a urine specimen because he figured the senior chief could get it from the hospital when they got theirs. Record at 46. He also testified that he told the nurse he did not want her to catheterize him because he felt he could drink something and urinate. Record at 47. Further the

appellant testified the procedure was very painful because it lasted so long. More specifically, he testified:

> She couldn't get no -- no urine. I was dehydrated and she had to -- I remember she said, "We're going to have to tickle it," or something, and she went all the way down and came back up and did it again like sort of to, you know, make it --.
>
> * * *
>
> Once the tickling sensation part didn't work, she had to go all the way and then she pumped some apparatus to open up my bladder or something and I'm watching all of this in pain and they could see the tears in my eyes. I was crying.
>
> * * *
>
> [The whole procedure was] degrading. I think that was so vile, you know. I couldn't understand what was -- mean enough on me (sic). I was there. I was there almost two hours and all of a sudden I'm being put under this cruelty, you know, just to give a sample all of a sudden. It was all of a sudden because Senior Chief showed up and there was a rush. I couldn't understand. I heard -- I heard it. And during the procedure there was talk -- talk going on of how, you should have, you know, did this, you should have -- and security guards in there, they're talking and when finally got something it was like applaud, you know, because they was trying so long and when she sticked it up in my bladder and came out with something, it was --

Record at 46-48. Finally, the appellant testified that there were 10 people present during the whole process. Record at 48.

The Government argued at trial that the motion to suppress should be denied because the extraction of urine from the appellant did not violate the appellant's due process rights under the Fourteenth Amendment [sic]. He also argued that the extraction was admissible under Military Rule of Evidence (Mil.R.Evid.) 312(d), which authorizes involuntary extractions of body fluids upon probable cause, and further that the sample was admissible under Mil.R.Evid. 312(f), which permits the admission of evidence obtained from a body intrusion for a valid medical purpose. The appellant contended that the search of the appellant's urine violated his due process rights under the Fourteenth Amendment [sic], *citing Rochin* and *United States v. Williamson*, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954), and that the admission could not be justified on the basis of the "valid medical purpose" rule, Mil.R.Evid. 312(f). The military judge entered the following essential findings:

> Let me say preliminarily that if the sole purpose of catheterization in this case had been to obtain evidence for prosecution, I would not hesitate to find that the forcible catheterization of a conscious protesting suspect would be an unreasonable search and seizure, notwithstanding the provisions of MRE 312(d), for the reasons set forth in *Williamson* and *Rochin v. California*. In his concurring opinion in *Williamson*, Judge

Brosman ably argues the reasons why such procedure would in the words of *Rochin v. California*, shock the conscience, the physical discomfort, the risk of infection and what Judge Brosman referred to as the psychological impact and what our Dr. Woods here today referred to as "psychological overlay," all argue against this as an approved method of evidence collection.

Besides, if evidence had been the sole object of this exercise, the command would have had the reasonable alternatives of waiting until Petty Officer Fitten could provide a sample naturally, under apprehension, if necessary, or prosecuting him for failure to obey a lawful order to provide a sample.

It is worthwhile to note here that there was no evidence that Petty Officer Fitten's Commanding Officer ever ordered him to be catheterized.

BMCS Burton was directed to try to obtain a sample of Petty Officer Fitten's urine by consent, if possible, or by execution of a search authorization if necessary, but only with the tacit understanding that Petty Officer Fitten was being catheterized for diagnostic purposes anyway.

I find that Dr. Woods ordered, and Nurse Broadwell performed, a catheterization of

> Petty Officer Fitten solely for authorized medical purposes. The fact that a portion of the urine thus extracted from Petty Officer Fitten was ultimately used for purposes of prosecution is totally collateral.
>
> The evidence seized by BMCS Burton is, therefore, admissible under MRE 312(f) and the defense motion to suppress is denied.

Record at 54-55.

On appeal the appellant contends that the extraction of fluids violated the principles of *Rochin*, whereas the Government contends that the urinalysis results were properly admitted under the "valid medical purpose" rule, Mil.R.Evid. 312(f).

III.

No urinalysis results were offered by the Government at trial. The only indication of what urinalysis results the parties were considering is in the appellant's motion to suppress wherein he alludes to the transportation of the specimen obtained by the senior chief to a Navy drug laboratory for testing and to the sample's allegedly testing positive for cocaine and marijuana. Appellate Exhibit I. Based on his essential findings, *supra*, it appears the military judge ruled on the admissibility of urinalysis results that might have been obtained on the specimen acquired by Senior Chief Burton. The military judge made no ruling respecting any results that might have been obtained on the specimen sent to the hospital's own laboratory.

It is the function of the military judge to ensure that the issues are focussed. *Cf. United States v. Brandell*, 35 M.J. 369 (C.M.A. 1992); *see United States v. Nix*, 36 M.J. 660, 665 (N.M.C.M.R. 1992). The better practice in litigating a motion to suppress is to have the relevant evidence offered. When the military judge rules on the motion, he or she then excludes, admits, or admits conditionally the precise item of evidence in issue. Such practice focusses the issues.

The practice employed here was in essence the solicitation and issuance of an advisory opinion from the military judge. The hazard in that practice is demonstrated in this case. There are *two* possible urinalyses -- one performed by a Navy drug laboratory and one performed by the hospital laboratory. In my view, these items of evidence would be treated differently. In any case, based on the defense counsel's written motion, the military judge's essential findings, and the oral arguments of the parties, we are now concerned only with the urinalysis performed by a Navy drug laboratory on the specimen obtained by the investigator, and it is upon those results that the parties agree the appellant's prosecution is predicated. Therefore, for our purposes, any urinalysis that might have been performed by the hospital, itself, is not germane to the resolution of the issues in this case.

IV.

Congress has authorized the President to promulgate rules of evidence applicable in trials by courts-martial. UCMJ art. 36(a), 10 U.S.C. § 836(a). Pursuant to that authority, the President has promulgated the Military Rules of Evidence. Under these rules all relevant evidence is admissible, except as otherwise provided by the

Constitution of the United States as applied to members of the armed forces, the Uniform Code of Military Justice, the Military Rules of Evidence, the Manual for Courts-Martial, or any Act of Congress applicable to members of the armed forces. Mil.R.Evid. 402. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by a considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Mil.R.Evid. 403. Evidence that is not relevant is inadmissible. Mil.R.Evid. 402.

The results of a relevant urinalysis on a specimen obtained from an accused servicemember are potentially admissible under several of the rules of evidence, discussed in part *infra*: (1) the specimen was obtained by consent (Mil.R.Evid. 314(a), (e)); (2) the specimen was obtained upon probable cause pursuant to an authorization to search issued by competent authority (Mil.R.Evid. 312(d), 315); (3) the specimen was obtained upon probable cause under exigent and other special circumstances without prior authorization by competent authority (Mil.R.Evid. 312(d), 315(g)); (4) the specimen was obtained for a valid medical purpose irrespective of probable cause (Mil.R.Evid. 312(f)); (5) the specimen was obtained without probable cause, but in the course of an administrative inspection (Mil.R.Evid. 313); or, (6) the specimen was unlawfully obtained as a result of an unlawful search or seizure, however, the specimen would have been obtained even if the unlawful search or seizure had not been made (the"inevitable discovery" rule) (Mil.R.Evid. 311(b)(2)).

Under Mil.R.Evid. 311, evidence obtained as a result of an unlawful search or seizure made by a person acting in

a governmental capacity is inadmissible against the accused if the accused makes a timely motion to suppress and the accused had a reasonable expectation of privacy in the person searched or when the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to the members of the armed forces.

A motion to suppress evidence on grounds of unlawful search or seizure is ruled on by the military judge, and the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure or that the evidence would have been obtained even if the unlawful search or seizure had not been made. Mil.R.Evid. 311(d)(4), (e)(1).

Evidence obtained from the non-consensual extraction of body fluids upon probable cause is admissible under certain circumstances.[3] In this regard, Mil.R.Evid. 312(d), *Extraction of Body Fluids*, provides:

> Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a [probable cause] search authorization under Mil. R. Evid. 315. Nonconsensual extraction of body fluids may be made without such warrant or authorization, notwithstanding Mil. R. Evid. 315(g) [probable cause searches without authorization under certain exigencies], only when there is clear indication that evidence

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[3] *See generally United States v. McClain*, 31 M.J. 130 (C.M.A. 1990).

> of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the evidence. Involuntary extraction of body fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications.

According to the Analysis accompanying this rule, the foregoing provision "does not apply to compulsory production of body fluids (*e.g.*, being ordered to void urine), but rather to physical extraction of body fluids (*e.g.*, catheterization or withdrawal of blood)." Mil.R.Evid. 312 Analysis. *See also Murray v. Haldeman*, 16 M.J. 74, 82 (C.M.A. 1983); Stephen A. Saltzburg *et al*, Military Rules of Evidence Manual 297 (3d ed. 1991).

Evidence obtained as a result of an intrusion into the body for a valid medical purpose, with or without probable cause, is also admissible under the rules. In this regard, Mil.R.Evid. 312(f), *Intrusions for Valid Medical Purposes*, provides:

> Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil.R.Evid. 311.

According to the Analysis accompanying the Military Rules of Evidence, the results of a urinalysis of a urine specimen obtained through involuntary catheterization for the servicemember's immediate health needs would be admissible in a subsequent trial under this rule. Mil.R.Evid. 312(f) Analysis, 313(b) Analysis.

Relevant evidence obtained from inspections in the armed forces is also admissible. Mil.R.Evid. 313. An "inspection" under this rule includes an order to produce bodily fluids, such as urine, however, an examination made for the primary purpose of obtaining evidence at trial or other disciplinary proceedings is not an "inspection" within the rule. If the purpose of the examination is to locate contraband, and if it is directed immediately following a report of a specific offense and was not previously scheduled, or specific individuals are selected for examination, or persons are subjected to substantially different intrusions during the same examination, then before the evidence obtained from the examination may be admitted, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of the rule. Mil.R.Evid. 313(b). Inspections must be conducted in a reasonable fashion and comply with Mil.R.Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid. *Id.* An inspection may not be unduly humiliating or degrading. *Cf. Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989) (an enlisted female's direct observation of a female officer donate a urine specimen was not unduly humiliating or degrading); *Murray v. Haldeman* (compulsory donation of a urine specimen for urinalysis was not conducted in an offensive manner or under circumstances which would tend to humiliate or degrade accused).

Finally, among the exceptions to the rule of inadmissibility of evidence obtained seized as a result of an unlawful search or seizure, is evidence that would have been obtained even if the unlawful search or seizure had not been made. Mil.R.Evid. 311(b)(2). This rule, "the inevitable discovery" rule, is based on *Nix v. Williams*, 467 U.S. 431 (1984), in which the United States Supreme Court held that "if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received." 467 U.S. at 444, quoted in *United States v. Allen*, 34 M.J. 228 (C.M.A. 1992). Thus, if the prosecution proved that the seizure of contraband was inevitable through the exercise of proper police procedures authorized by proper authority despite the prior illegal search, the illegally seized evidence need not be excluded. *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982). In order to avail itself of this exception to the exclusionary rule, the prosecution must show "by a preponderance of the evidence, that there is (1) a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of police misconduct and (2) that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation." *United States v. Kaliski*, 37 M.J. 105, 109 (C.M.A. 1993) (quotations omitted). In any case, the inevitable discovery rule must be applied carefully and narrowly, *United States v. Korda*, 36 M.J. 578 (A.F.C.M.R. 1992), and "each case must be decided on its specific facts." *Kaliski*, 37 M.J. at 109.

V.

In *Rochin*, the police broke into the appellant's bedroom and questioned him about the ownership of two capsules on a nightstand. Rochin placed the capsules in his mouth. Following an unsuccessful struggle with Rochin, the police took him in handcuffs to a hospital where at a police officer's direction, a doctor forced an emetic solution through a tube into Rochin's stomach. As a result of this "stomach pumping" procedure, Rochin disgorged the capsules. The capsules were seized by the police. The capsules contained morphine. Rochin was convicted in a California Superior Court of possessing a preparation of morphine in violation of the California code. The chief evidence against Rochin was the two capsules admitted in evidence over his objection. 324 U.S. at 166. The United States Supreme Court concluded that the foregoing conduct of the police "shocks the conscience" and reversed the state conviction brought about by this conduct because it offended the Due Process Clause of the Fourteenth Amendment to the Constitution. 342 U.S. at 172, 174.

Shortly after *Rochin* was decided by the Supreme Court, the Court of Military Appeals held Rochin was applicable in trials by court-martial. *United States v. Speight*, 5 U.S.C.M.A. 668, 18 C.M.R. 292 (1955); *United States v. Jones*, 5 U.S.C.M.A. 537, 18 C.M.R. 161 (1955); *United States v. Booker*, 4 U.S.C.M.A. 335, 15 C.M.R. 335 (1954); *Williamson.* In *Williamson*, a majority of our senior Court concluded that the extraction of urine by catheterization of an unconscious accused by medical personnel did not violate *Rochin*, however, in a concurring opinion, Judge Brosman allowed that had the evidence been obtained over the accused's protest, he would conclude "that fundamental standards of decency in law

enforcement had been infringed, and that a conviction predicated in any part on such evidence violated the concept of 'military due process.'" 15 C.M.R. at 329. In a vigorous dissenting opinion, Judge Quinn was of the view that the unconscious state of the accused was immaterial, the real question being "whether or not an outside agency is justified in invading the sanctity of the human body without consent." 15 C.M.R. at 332. Moreover, as between the use of a stomach pump and a catheter, Judge Quinn found the latter to be more reprehensible. 15 C.M.R. at 334.

In *Jones*, the Court was presented with the case hypothesized by Judge Brosman in his concurrence a year earlier. Jones was confined for an unauthorized absence. He was observed acting strangely and was suspected of using drugs. The accused agreed to go to the dispensary. When other methods at securing a urine specimen from the accused failed, he was catheterized by a doctor over the accused's objection. An analysis of the urine obtained revealed the presence of morphine. The appellant was tried and convicted for wrongful use of morphine. Judges Quinn and Brosman joined to reverse on the basis of their views in *Williamson*. In *Speight*, a case with facts virtually identical to those in *Jones*, a unanimous Court again reversed the conviction. Judge Latimer, the dissenter in Jones, concurred in the result, observing that *Jones* "ended catheterization as a scientific method of crime detection" and further dissents by him served no useful purpose. 18 C.M.R. at 293.

In *Breithaupt v. Abram*, 352 U.S. 432 (1957), the accused's pick-up truck was involved in an automobile accident with a passenger car on a New Mexico highway. Three persons in the passenger vehicle were killed. The

unconscious accused was transported to a hospital where, at a state patrolman's request, a medical doctor extracted a blood specimen by means of a hypodermic needle. The specimen was given to the patrolman. The subsequent chemical analysis of the specimen for blood-alcohol content was admitted in evidence over the accused's objection in a state prosecution for manslaughter. The Supreme Court held that this method of obtaining evidence did not "shock the conscience" or offend a "sense of justice," as in *Rochin*, and did not violate the Due Process Clause of the Fourteenth Amendment. 352 U.S. at 434, 437.

In *Schmerber v. California*, 384 U.S. 757 (1966), the Supreme Court extended Breithaupt to a conscious accused and further held that the involuntarily extraction of a blood specimen at police request by a physician in a hospital environment according to accepted medical practices did not violate the Fourth Amendment's protection against unreasonable searches and seizures, as applied to the States through the Fourteenth Amendment.[4]

In *Winston v. Lee*, 470 U.S. 753 (1985), the Supreme Court revisited *Schmerber* to consider whether a state may, consistent with the Fourth Amendment, compel an accused to undergo the surgical removal of a bullet in order to use it as evidence against him in a prosecution for attempted armed robbery. The Supreme Court concluded that the operation would intrude severely on the accused's privacy interests, that the medical risks, although apparently not extremely severe, were a subject of considerable dispute,

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[4] *Schmerber* has been applied to trials by courts-martial. See *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990); *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980).

that the state had failed to demonstrate a compelling need for the bullet, and that therefore the state had failed to demonstrate that it would be reasonable under the terms of the Fourth Amendment to search for evidence of the crime by means of the contemplated surgery. 470 U.S. at 766. In so holding, it stated:

> The Fourth Amendment is a vital safeguard of the right of the citizen to be free from unreasonable governmental intrusions into any area in which he has a reasonable expectation of privacy. Where the Court has found a lesser expectation of privacy, or where the search involves a minimal intrusion on privacy interests, the Court has held that the Fourth Amendment's protection are correspondingly less stringent. Conversely, however, the Fourth Amendment's command that searches be "reasonable" requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search "reasonable." Applying these principles, we hold that the proposed search in this case would be "unreasonable" under the Fourth Amendment.

470 U.S. at 767 (citations omitted).[5]

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[5] In so holding, the Court also took note of its prior holding in *Rochin*: "*Rochin*, recognizing the individual's interest in 'human dignity,' held the search and seizure unconstitutional under the Due Process Clause." 470 U.S. at 670 n.5.

"It is now settled that the protections of the Fourth Amendment and, indeed, the entire Bill of Rights are applicable to the men and women serving in the military services of the United States unless expressly or by necessary implication they are made inapplicable." *United States v. Ezell*, 6 M.J. 307, 313 (C.M.A. 1979). "This is not to say, however, that in its application the Fourth Amendment does not take into account the exigencies of military necessity and unique conditions that may exist within military society." *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981). "[W]hen it is suggested that a different rule should apply to military searches and seizures than those in the civilian community, some burden exists to show the need for such a variation." *Id.*

Thus, *Rochin's* fundamental principle that the due process of law, provided for in the Fifth Amendment as well as the Fourteenth Amendment, precludes prosecution on the basis of evidence obtained by force, brutal and insensitive to human dignity, is now a principle of military law. Likewise, in the absence of some showing of necessity for a different rule, the Fourth Amendment's protection against unreasonable searches and seizures applies to military personnel as in *Lee* to preclude invasive surgical procedures for the purpose of obtaining incriminating evidence. Inasmuch as these are constitutional principles applicable to trials by courts-martial, the Military Rules of Evidence must be construed in harmony with them. *Cf. United States v. Kossman*, 38 M.J. 258, (C.M.A. 1993); *United States v. Clemons*, 16 M.J. 44, 49 (Judge Everett concurring).

VI.

On appeal, this Court may at its discretion review a trial judge's evidentiary rulings applying an abuse of discretion standard or, alternatively, it may review them *de novo*. *See United States v. Cole*, 31 M.J. 270 (C.M.A. 1990). While we are generally inclined to defer to a trial judge's essential findings of fact on a motion to suppress evidence, we are not bound by them. *United States v. Jones*, 34 M.J. 899 (N.M.C.M.R. 1992). In any case, the trial judge's essential findings will not be given deference when they are not supported by any evidence of record or when they are clearly erroneous. *See United States v. Cummings*, 21 M.J. 987 (N.M.C.M.R. 1986). Moreover, there is no deference as to questions of law. *Cf.* UCMJ art. 66(c), 10 U.S.C. § 866(c).

VII.

As noted above, there are six potential bases upon which the results of the urinalysis may have been admitted: (1) a consent search; (2) a search authorized upon probable cause; (3) a search upon probable cause without authorization, but under exigent and special circumstances; (4) an inspection; (5) an intrusion for a valid medical purpose; and (6) inevitable discovery.

The admissibility of the test results on the basis of consent or an administrative inspection may be summarily rejected. The record before us clearly demonstrates that the appellant adequately registered his objection and no one seriously contends he consented. Similarly, the evidence was not obtained on the basis of an administrative inspection. Extraction of body fluids, as distinguished from the production of body fluids, is not contemplated as

an administrative inspection within Mil.R.Evid. 313. To the contrary, extractions of body fluids, to the extent they may be constitutionally performed at all, must qualify under Mil.R.Evid. 312. Additionally, the evidence suggests the command investigator acquired his specimen for the primary purpose of obtaining evidence for use at trial or other disciplinary proceedings, and the conduct of administrative inspections of servicemembers by means of catheterization would unquestionably be unduly humiliating and degrading. *Unger; Murray*, 16 M.J. at 81. Again, no one seriously suggests the evidence was obtained as a result of an inspection.

I am also unpersuaded that the record shows the evidence was procured as a result of a command authorized extraction of body fluids under Mil.R.Evid. 312(d) and 315. Firstly, I reiterate the record does not reflect what was authorized or who authorized it. Even if we assume that the appellant's commanding officer authorized the seizure of a urine specimen, as appellant states in his trial brief, there is nothing in the record to show that the commanding officer authorized search and seizure by catheterization. Equally probable, the commanding officer contemplated the appellant would be ordered to produce a specimen and, if necessary, obliged to consume fluids and void in nature's good time without resort to intrusive measures. Neither the commanding officer nor the legal officer were called to set these matters to rest. One may infer that this information, which presumably was within their possession, would have been produced by the Government at trial if it had been favorable to the Government's interests.

More to the point, our senior Court has already stated with clarity that obtaining evidence from an accused by use

of a catheter over his protest infringes upon fundamental standards of decency in law enforcement and a conviction predicated in any part on such evidence violates the concepts of due process. *Williamson*, 15 C.M.R. at 329 (Judge Brosman concurring); *Speight; Jones*. We are not free to ignore this precedent. *See United States v. Jones*, 23 M.J. 301 (C.M.A. 1987).

Nothing in the 40 years since the *Williamson* line of cases was decided has transpired in civilized society to render search and seizure by catheterization less offensive to fundamental standards of decency. The observations of Judges Brosman and Quinn concerning this procedure ring as true today as they did when these cases were decided. If anything, the testimony taken in this case confirms the observations of Judge Brosman in *Williamson*:

> In the first place, catheterization involves infinitely more physical discomfort than the mere pricking of a suspect's finger -- although it is perhaps not so painful as the dissenting judge [Judge Quinn] implies. The degree of distress caused by this medical procedure -- I am informed -- will depend on a number of factors, principally the suspect's threshold of pain, his nervousness and tension at the time, and the skill of the operator. Second, at least some slight risk of urinary tract infection is associated with the challenged operation. In this regard, a mitigating circumstance would be present, of course, if the extraction were performed -- as in the instant case -- by a qualified physician. A third -- and to my mind a most important factor -- is the psychological

> impact potential possessed by this type of scientific exploration. The extraction of the fluid is, of course, from the male reproductive organ. Subconscious fears associated with this area are substantial -- indeed so great that many schools of psychoanalysis place special emphasis on the role of the "fear of castration." In addition, an accused might well entertain distinctly conscious fears of infection from the operation. Finally, if forcible catheterization were permitted, a sublimated "third degree" -- one embracing pseudoscientific menaces -- might easily result. By this I mean to suggest that the fear of injury to the organs concerned is so massive and pervading that a suspect might tend to choose confession as a route of escape from the threat of catheterization. . . . In light of these considerations, I must hold that the forcible extraction of urine from a protesting accused is as noxious as the use of a stomach pump.

15 C.M.R. at 329.

The humiliation and indignity of the process here is patent. Over his protest the appellant was subjected to the manipulation of his genitals by a female nurse and to the discomforting, if not painful, insertion and maintenance of a tube therein in full view of a crowd of onlookers, not all of whom were medical personnel.

The fact that the procedure was accomplished by someone who is medically trained is a consideration, but it is not dispositive. The procedures employed in *Rochin,*

Williamson, Jones, Speight, and *Lee* were all performed or to be performed by medical doctors.

If we assume the catheterization was authorized by the appellant's commanding officer, an assumption we may not fairly make on the evidence of record, the fact of authorization would not render the procedure of obtaining evidence by catheterization over a subject's protest less violative of the standards of decency. A prosecution predicated on action offensive to the sense of justice is no less so because the commanding officer authorized it. Cf. *Lee*. *See, e.g., People v. Scott*, 21 Cal. App. 3d 284, 578 P.2d 123 (1978) (court-ordered bodily intrusion, which consisted of massaging the prostrate gland to obtain a semen sample, was regarded as extreme as regurgitation in *Rochin*).

I am also unable to find in the record evidence supporting the military judge's essential finding that "BMCS Burton was directed to try to obtain a sample of Petty Officer Fitten's urine by consent, if possible, or by execution of a search authorization if necessary, but only with the tacit understanding that Petty Officer Fitten was being catheterized for diagnostic purposes anyway." Record at 54-55 (emphasis added). Specifically, I am unable to find any evidence that the appellant's commanding officer was informed that the appellant would be catheterized for diagnostic purposes anyway or how the commanding officer might have come to understand such, tacitly or otherwise.

In short, based on the principles of due process of law embodied in the Fifth Amendment, as applied to the military according to Williamson and its progeny, I would hold, as our senior Court binds us to do, that obtaining a

urine specimen by catheterization cannot be sanctioned under Mil.R.Evid. 312(d), as a probable cause search, with or without command authorization. *A fortiori*, a search and seizure by catheterization is *per se* unreasonable under Fourth Amendment analysis. If the results of the urinalysis of this specimen may be admitted, admission must be justified on other bases entirely. I turn, therefore, to the "valid medical purposes" rule, Mil.R.Evid. 312(f), upon which the Government rests as the basis for admitting the urinalysis results in this case.

The appellant does not contest the proposition that servicemembers may be subjected to invasive medical procedures against their will when necessary to preserve the servicemember's health. Nor does he contest the notion that incriminating evidence obtained in the course of such procedures may be used against in trials by courts-martial. In fact, very recently the United States Court of Military Appeals held that the results of chemical analysis on blood drawn in an emergency room for diagnostic purposes would be admissible under Mil.R.Evid. 312(f), even though the results did not actually affect the accused's treatment. *United States v. Maxwell*, 38 M.J. 148 (C.M.A. 1993).

We have been cited no reported military case, other than those cited above, that prescribes the limits of what Government medical personnel may do over the objection of military patients.[6] I do note, however, that the Manual of the Medical Department, U.S. Navy, provides:

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[6] Such authority would likely be limited to the least invasive procedure necessary under the circumstances of the moment according to medical judgment, and would not extend to invasions simply as a matter of convenience.

Compulsory Medical or Surgical Treatment (Regulatory)

(1) By authority delegated by the Secretary of the Navy, and with the *approval of the commanding officer, the senior medical . . . officer . . .* of a ship or station, after consultation with *other medical . . . officers* if available, will, where in the medical officer's judgment the best interests of the individual or of the service require, take the following measures with or without the consent of the individual concerned:

(a) Emergency care required to preserve the life or health of the member.

(b) Care necessary to protect the life or health of a member who is considered by a *psychiatrist* to be mentally incompetent.

* * *

MEDMAN, ¶ 2-18 (emphasis added).[7] I reiterate, the record before us is unclear on the question of what, if any, medical officer actually authorized the catheterization. The military judge correctly pointed out there was no evidence that the appellant's commanding officer did. Quite clearly, there is no evidence that the senior medical officer or any

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[7] *See United States v. Cooper*, 35 M.J. 417 (C.M.A. 1992) and cases cited therein for a discussion of the consequence of an agency's failure to follow its own regulation.

psychiatrist at Balboa Naval Hospital authorized a compulsory catheterization.

Whatever the limits may be on the authority of medical personnel, vis-a-vis nonconsenting military personnel, it cannot be doubted that the acquisition of incriminating evidence by Government doctors through invasive procedures and its subsequent use in the patient's prosecution may only be sustained without implicating due process concerns if the "valid medical purpose" exception is confined to its bounds. Disciplinary authorities may not strip the accused of his constitutional rights by merely donning a white coat or by calling upon medical personnel to do it for them. *See Rochin; Jones; Speight; Lee.* Stating the obvious: Once the valid medical purpose for an intrusion ceases, the admission of evidence taken thereafter by means of an ongoing intrusion can no longer be justified on the basis of medical necessity.

The appellant argues, and I agree, that the specimen obtained by the investigator was not used for any medical purpose, valid or otherwise, nor was it drawn in contemplation of any such purpose. When the investigator's specimen was drawn, the specimen arguably drawn for medical purposes had already been taken. According to the Government's own witness, Dr. Woods, "As soon as the urine sample is obtained in a case like this, the catheter is generally withdrawn. . . . It can be left in other cases." Record at 14. Once the medical purpose for the catheterization and the extraction had ceased, the appellant was entitled to have the procedure stopped and the apparatus immediately removed. When the nurse left the apparatus in the appellant's penis and bladder for the purpose of drawing more urine for the investigator, she was not acting for any valid medical purpose and the

scenario *eo instante* became that condemned in *Williamson* and its progeny.

One arrives at the same conclusion with either the scenario testified to by Ms. Broadwell or that testified to by the investigator. The investigator injects one additional factor, however. He testified that the nurse stated she had more urine than she needed for hospital purposes in the first specimen she had drawn and she poured some of that specimen into the one she gave to the investigator. This scenario suggests that the nurse had extracted more urine than was reasonably necessary for a valid medical purpose.[8] In any case, from the outset the nurse was embarking on two missions -- draw a specimen for the hospital and draw a specimen for the investigator. Only the one that went to the hospital could arguably be covered under the valid medical purposes rule, and that specimen is not a consideration on the record of this case.

Finally, one must address the question of "inevitable discovery," reminded that the rule must be applied narrowly and carefully. The Government made no attempt to establish the admissibility of the urinalysis results on the basis of inevitable discovery. Whether or not a urine specimen would inevitably have been procured by the Government through lawful means was not established. Nor did the Government prove it was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation. Moreover, we have not been cited to any authority that would apply the "inevitable discovery" rule to evidence seized as a result of a Rochin due process

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[8] The record does not indicate whether the portion of urine she shared, if any, was sufficient in and of itself for purposes of drug laboratory testing.

violation. Rather, the "inevitable discovery" rule appears to have been applied only to technical Fourth Amendment violations. Surely the inevitable discovery rule may not excuse a prosecution based on police conduct that infringed fundamental standards of decency. Accordingly, I conclude the "inevitable discovery" exception, Mil.R.Evid. 311(b)(2), is unavailable here.

VIII.

Based on the foregoing, I would hold the military judge abused his discretion in failing to suppress test results of a urinalysis conducted upon urine obtained by the base investigator by means of catheterization over the appellant's protest. Inasmuch as the appellant's pleas of guilty to the drug offenses were entered conditionally pursuant to R.C.M. 910(a)(2), I would set aside the findings of guilty and sentence. The civil rights of American citizens are understandably curbed when they embark upon service in the armed forces of their country, but no provision of the Constitution or the Code countenances searching their bladders for incriminating evidence in the name of good order and discipline.[9] Here is where common decency and the Constitution demand we draw the line.

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[9] *See* UCMJ art. 93, 10 U.S.C. § 893.

APPENDIX C

MANUAL FOR COURTS - MARTIAL, 1984

Prescribed by Executive Order No. 12473.

April 13, 1984

PART III MILITARY RULES OF EVIDENCE

SECTION III. EXCLUSIONARY RULES AND RELATED MATTERS CONCERNING SELF-INCRIMINATION, SEARCH AND SEIZURE, AND EYEWITNESS IDENTIFICATION

Rule 312. Body views and intrusions

(a) *General rule.* Evidence obtained from body views and intrusions conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

* * *

(d) *Extraction of body fluids.* Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under Mil. R. Evid. 315. Nonconsensual extraction of body fluids may be made without such warrant or authorization, notwithstanding Mil. R. Evid. 315(g), only when there is a clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of

the evidence. Involuntary extraction of body fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications.

* * *

(f) *Intrusions for valid medical purposes.* Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a service member. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

(g) *Medical qualifications.* The Secretary concerned may prescribe appropriate medical qualifications for persons who conduct searches and seizures under this rule.

APPENDIX D

MANUAL FOR COURTS - MARTIAL, 1984

Prescribed by Executive Order No. 12473,
as amended by E. O.

No. 12484.

July 13, 1984

PART III MILITARY RULES OF EVIDENCE

SECTION III. EXCLUSIONARY RULES AND RELATED MATTERS CONCERNING SELF-INCRIMINATION, SEARCH AND SEIZURE, AND EYEWITNESS IDENTIFICATION

Rule 315. Probable cause searches

(a) *General rule.* Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Definitions.* As used in these rules:

(1) *Authorization to search.* An "authorization to search" is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order

directing subordinate personnel to conduct a search in a specified manner.

(2) *Search warrant.* A "search warrant" is an express permission to search and seize issued by competent civilian authority.

(c) *Scope of authorization.* A search authorization may be issued under this rule for a search of:

(1) *Persons.* The person of anyone subject to military law or the law of war wherever found[.]

* * *

(d) *Power to authorize.* Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) *Commander.* A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or if that place is not under military control, having control over persons subject to military law or the law of war[.]

* * *

(e) *Power to search.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police,

military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

(f) *Basis for search authorizations.*

(1) *Probable cause requirement.* A search authorization issued under this rule must be based upon probable cause.

(2) *Probable cause determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be based upon any or all of the following:

(1) Written statements communicated to the authorizing officer;

(2) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(3) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. The Secretary of Defense

or the Secretary concerned may prescribe additional requirements.

(g) *Exigencies.* A search warrant or search authorization is not required under this rule for a search based on probable cause when:

(1) *Insufficient time.* There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

* * *

(4) *Not required by the Constitution.* A search warrant or authorization is not otherwise required by the Constitution of the United States as applied to members of the armed forces.

* * *